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No. 88-386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

YELLOW BUS LINES, INC.,
PAULA WESTGATE, MARIA TRIGGS, and
PETER MCKINNON,
Cross-Petitioners,

v.

DRIVERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 639 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, and JAMES F. WOODWARD,
Respondents.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the findings of fact by the two lower courts demonstrate a very obvious and exceptional showing of error.

2. Whether RICO Section 1962(c) requires that the person engaging in the pattern of racketeering be distinct from the requisite RICO enterprise.

PARTIES BELOW AND AFFILIATES OF RESPONDENT

Pursuant to Rule 28.1, Respondent Local 639 states that it is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.

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* The applicable portion of RICO, 18 U.S.C. § 1962(c), is set forth in the Appendix.

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YELLOW BUS LINES, INC.,
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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The necessary facts are set forth in the Petition for a Writ of Certiorari filed by Respondents Drivers, Chauffeurs and Helpers Local Union No. 639 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO ("Local 639" or "the Union") and James F. Woodward on August 1, 1988 in case No. 88-190. (pp. 3-9).

REASONS FOR DENYING THE WRIT

Cross-Petitioners' primary purpose, to obtain review of the factual determinations made below, is an insufficient basis for granting the petition for a writ of certiorari. The alternative basis for review, the determination that RICO Section 1962(c) requires that the culpable person be separate and distinct from the denominated enterprise, is similarly unavailing because the court of appeals' decision is consistent with the overwhelming weight of authority.

I. THE FACTUAL DETERMINATIONS MADE BELOW DO NOT WARRANT REVIEW

A fair reading of the cross-petition reveals that it is merely a request that this Court grant certiorari in order to review the concurrent factual determinations made by the district court and affirmed by the court of appeals. Cross-Pet. at 8-15. Aside from the fact that Cross-Petitioners' assertions are contrary to the record evidence, it is well settled that this Court will not grant a writ of certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925); *General Talking Pictures Corp. v. Western Electric Co., Inc.*, 304 U.S. 175, 178 (1938); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). The Supreme Court is "not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other . . ." *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951). Certiorari should be granted only on issues which are of importance to the public as distinguished from that of the parties. *Id.* at 502. *See also Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74-79 (1955).

Certiorari is particularly inappropriate in cases, such as the instant one, where the appellate panel thoroughly examined the district court decision and its factual de-

terminations and concurred in them. Indeed, the court of appeals reversed the lower court's conclusion that Local 639 was not liable for the minor vandalism occurring during the four-day strike. Local 639 Pet. App. 4a-8a. In such situations where the court of appeals has reviewed and concurred in the record as determined by the district court, this Court has followed its "two-court" rule. Pursuant to that policy, this Court will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Berenyi v. Immigration Service*, 385 U.S. 630, 635 (1967), citing *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

In apparent recognition of this flaw, Cross-Petitioners have sought to disguise their factual arguments in constitutional garb. Cross-Pet. 15. One fleeting reference to the Seventh Amendment on the final page of the cross-petition, however, cannot cure this fatal defect. As stated by Justice Frankfurter:

> If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated. This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence.

Dick v. New York Life Ins. Co., 359 U.S. 437, 455-56 (1959) (Frankfurter J., dissenting).[1] This Court should

[1] Justice Frankfurter's lament was part of his continuing objection to the Court's review of cases brought under the Federal Employer's Liability Act and Jones Act, under the guise that such

recognize the verbal smoke screen created by the Cross-Petitioners and deny the request for certiorari.

II. THE REQUIRED DISTINCTION BETWEEN A CHARGED PERSON AND AN ENTERPRISE IS EMBODIED IN RICO SECTION 1962(c)

An overwhelming majority of the lower courts have now construed RICO Section 1962(c) to require that the "person" who engages in the pattern of racketeering activity be separate and distinct from the requisite "enterprise." *United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc.*, 837 F.2d 356, 364 (9th Cir. 1988); *Saporito v. Combustion Engineering, Inc.*, 843 F.2d 666, 678 (3d Cir. 1988); *Paradise Hotel Corp. v. Bank of Nova Scotia*, 842 F.2d 47, 53 (3d Cir. 1988); *Entre Computer Centers, Inc. v. FMG of Kansas City, Inc.*, 819 F.2d 1279, 1287 (4th Cir. 1987); *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 440-41 (5th Cir.), *cert. denied*, 107 S.Ct. 3276 (1987); *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 122-123 (5th Cir. 1986); *Schreiber Distributing v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1396-98 (9th Cir. 1986); *United States v. Benny*, 786 F.2d 1410, 1415-16 (9th Cir. 1986), *cert. denied*, 479 U.S. 1017 (1987); *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 29-30 (1st Cir. 1986); *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 633-34 (3d Cir. 1984); *Bennett v. United States Trust Co. of New York*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *Haroco v. American National Bank & Trust Co.*, 747 F.2d 384, 401-02 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985); *United States v.*

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review was necessary to protect the right to a jury trial. *See, e.g., Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 506-07 (1957). It appears that the Court has adopted the validity of Justice Frankfurter's position. *See Felts v. Seaboard Coast Line Railroad Co.*, 409 U.S. 926 (1972); *Adkins v. Kelly's Creek Railroad Co.*, 409 U.S. 926 (1972).

Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1061-62 (8th Cir. 1982), *modified*, 710 F.2d 1361 (*en banc*), *cert. denied*, 464 U.S. 1008 (1983); *Alexander Grant & Co. v. Tiffany Industries, Inc.*, 742 F.2d 408, 411, n.6 (8th Cir.), *cert. denied*, 469 U.S. 1205 (1984).

The position adopted by these courts is consistent with both the plain language of the statute and the legislative intent underlying the enactment of RICO. Section 1962(c) prohibits any person employed by or associated with an enterprise from conducting that enterprise through a pattern of racketeering activity. The provision clearly requires a relationship between a "person" and an "enterprise" in order to state a claim. Only the person employed by or associated with the enterprise, not the enterprise itself, may violate Section 1962(c).[2] "The enterprise is mentioned in the section only as the instrument of the person doing the racketeering, and there is no suggestion that the enterprise also may be liable . . . ." *Schofield v. First Commodity Corp.*, 793 F.2d at 30. This is consistent with the legislative intent underlying the enactment of RICO. Inasmuch as the articulated purpose of RICO was to thwart the infiltration of legitimate businesses, "it is logical that Congress would have designed Section 1962(c) so that it reached the criminal but protected the victimized enterprise from liability." *Id.* at 31. *See also B.F. Hirsch v. Enright Refining Co.*, 751 F.2d at 633-34; *Bennett v. United States Trust Co. of New York*, 770 F.2d at 315.

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[2] Conversely, Section 1962(a) contains no such limitation and, accordingly, the courts have held that the defendant person and the enterprise can be the same for purposes of Section 1962(a). *United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc.*, 837 F.2d at 364; *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d at 1396-98; *Schofield v. First Commodity Corp.*, 793 F.2d at 31-32.

The only authority contrary to the decisions cited above is the ruling of the Eleventh Circuit Court of Appeals in *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). In *Hartley*, the court acknowledged that it was presented with a case of first impression (*Id.* at 988), and agreed with the government's suggestion, and the defendant's concession, that the problem would never have occurred had the government merely reframed the indictment in that case. *Id.* at 989. ("Had the government elected to charge the defendants in this manner, it would certainly have alleviated this lengthy discussion.") Subsequent to *Hartley*, the courts have consistently rejected its rationale and holding. Rather than evidencing a split among the lower courts, it represents an idiosyncratic view of the statute at a time when the case law was in its infancy. Inasmuch as the courts below are in almost total agreement on this issue, it does not warrant this Court's review.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISION INVOLVED

18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.